

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 563 of 2001
(Old No. 2971 of 1981)

Sri Nathoo Ram (Since deceased)
Substituted through his legal heirs

1/1. Sunil

1/2. Vijay

1/3. Ajay

S/o late Sri Surendra

S/o late Sri Nathoo Ram

1/4. Pitamber Dutt

1/5. Rajendra Prasad Kala

1/6. Pradeep Kumar

1/4 to 1/6 are sons of late Sri Nathoo Ram

1/7. Smt. Satyawati W/o late Sri Nathoo Ram

All R/o Village and Post Raipur,
District Dehradun.

..... Plaintiff/Appellants

Versus

1. Smt. Rameshwari Devi
Widow of Sri Paras Ram.,

2. Sri Arun Kumar
S/o late Sri Paras Ram

3. Km. Suman
D/o late Sri Paras Ram

4. Km. Nisha
D/o late Sri Paras Ram

5. Sri Harish
S/o Shri Tika Ram

All R/o Kowlagarh, P.O. New Forest,
District Dehradun.

.....Defendant / Respondents

Mr. Lokendra Dobhal, Advocate for the appellant.

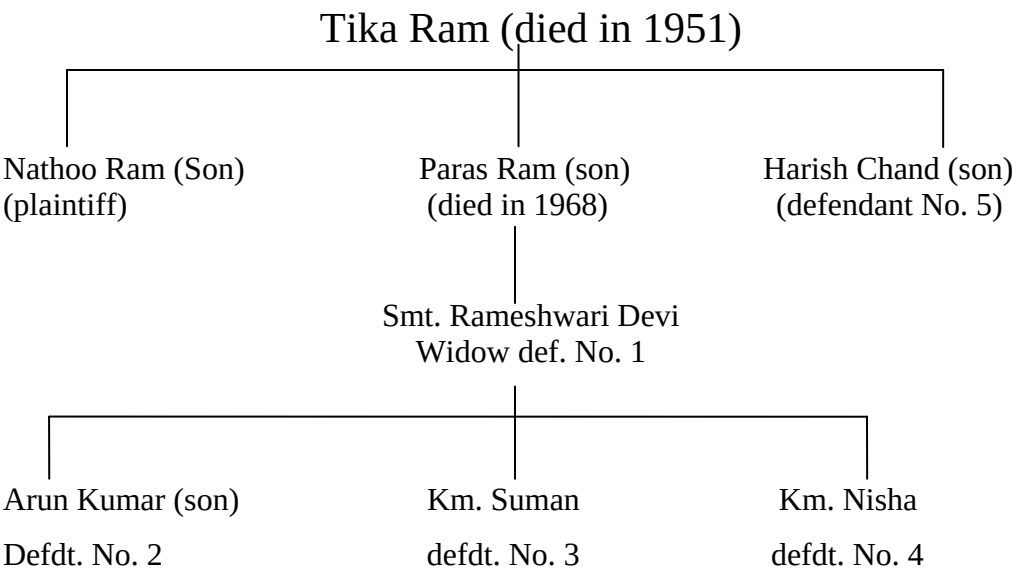
Mr. S.K. Jain, Advocate for the respondents.

Hon'ble Prafulla C. Pant, J.

This second appeal, preferred under Section 100 of the
Code of Civil Procedure, 1908, is directed against the

judgment and decree dated 03.09.1981, passed in Civil Appeal No. 04 of 1979 whereby, judgment and decree passed by the trial court on 19.12.1978 in Original Suit No. 26 of 1975, is confirmed.

2) Brief facts of the case are that plaintiff / appellant filed a suit for partition of house detailed at the foot of the plaint, on the ground that the plaintiff has 1/3 share in the property left behind by his deceased father Tika Ram. The parties are related with each other by the following pedigree:



Property in suit mentioned in the foot of the plaint is a house consisting of nine rooms situated in village Kaulagarh, District Dehradun, over the land measuring area one bigha six biswa. Pleadings between the parties show that the pedigree is admitted to the parties but it is pleaded by the defendant No. 5 that Tika Ram is not the owner of the property in suit. In this connection, it is pleaded by the contesting defendants that the house was purchased in the year 1944 by Paras Ram and defendant No. 5 in the name of Tika Ram as “BENAMI”. It is further pleaded in the written statement that the plaintiff separated from his father in the year 1931 and was living separately, as such, he was not in

possession of the property. Lastly, it was pleaded by the contesting defendants that the suit was barred by time.

3) On the basis of the pleadings following issues were framed by the trial court:

1. *Whether, the plaintiff owns 1/3 share in the property in suit?*
2. *Whether, the plaintiff has no share in the property in dispute, as alleged in para 8 to 12 of the written statement?*
3. *Whether, the court has no jurisdiction to try the suit?*
4. *Whether, the suit is barred by time?*
5. *Whether, the plaintiff has no right to maintain the suit?*
6. *To what relief, if any, the plaintiff is entitled?*

4) After recording the evidence and hearing the parties, initially, the suit was decreed on 28.08.1975 by the trial court. It appears that said judgment and decree was challenged before the first appellant court in Civil Appeal No. 96 of 1975, which was allowed and the case was remanded back to the trial court. Thereafter, on 26.08.1976, the trial of the suit proceeded afresh as the appointment of guardian of the minor defendant was required to be made as per appellate court's order. The trial court proceeded afresh and after hearing, dismissed the suit on 19.12.1978 on the ground that the purchase of house in dispute in the name of Tika Ram was Benami and the plaintiff had already got separated from the joint family of his father. Aggrieved by said judgment and decree dated 19.12.1978, plaintiff filed

Civil Appeal No. 04 of 1979, which was also dismissed on 03.09.1981 by the lower appellate court. Hence, this appeal.

5) This Second Appeal was filed before the Allahabad High Court on 17.11.1981, which was admitted on following substantial questions of law:

1. *Whether, the lower appellate court has committed an error of law in placing the burden of proof (that the sale deed in favour of Tika Ram was Benami) on the appellant?*
2. *Whether, the fact that the appellant separated from his father in the year 1931 had the affect of depriving him of the rights in property lefty by his father?*

6) I heard learned counsel for the parties and perused the record of the lower courts.

Answer to substantial question of law No. 1:

7) Admittedly, the parties are related to each other as mentioned in the pedigree above. It is also not disputed that Tika Ram in whose name house was purchased has died in 1951. Since, the house is admittedly purchased in the name of Tika Ram, and Nathoo Ram is son of Tika Ram, as such in a suit for partition by him after the death of his father, the burden of proof clearly lies on the defendants who allege that the transaction in the name of Tika Ram was Benami. In other words, since it is the contesting defendant / respondents who have taken the plea that Harish Chandra along with his brother Paras Ram purchased the house in the name of their father as such they are required to prove said fact. Needless to say, that Section 103 of the Indian

Evidence Act, 1872 provides that burden of proof in a suit as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on another person. Section 106 of the Indian Evidence act, further makes it clear that when any fact is specifically within the knowledge of any person, the burden of proving that fact is upon him.

8) Learned counsel for the defendant / respondents argued that defendants have discharged the burden by making statement before the trial court through D.W. 1, Arun Kumar that the property in question was purchased by Harish Chand and Paras Ram in the name of their father. This witness who was examined on 01.09.1975, was aged 29 years at the time of making the statement. The sale deed in favour of Tika Ram is alleged to have been executed in the year 1944. As such, statement of this witness throws little light on the point whether the transaction was Benami or not? D.W. 2, Jagdish Prasad who was also examined by the trial court on 04.08.1975, though has supported the defendants, he being an outsider to the family, it is not clear how he was aware of the fact that the defendant took loan from one Ram Lal to buy the house in question. This witness is unable to mention even name of the person from whom the house was purchased. Not only this, D.W. 2, Jagdish Prasad in his statement dated 04.08.1975 has nowhere stated that the disputed transaction was a Benami transaction. On the other hand, P.W. 1, Nathoo Ram (plaintiff) in his statement dated 04.08.1975 has categorically stated that the defendants did not purchase the property after taking loan from Ram Lal, as alleged by them.

9) In the above circumstances, it cannot be said that the house in question was purchased Benami by the defendants in the name of their father. Learned trial court and learned lower appellate court have wrongly dismissed the suit on the ground that the transaction was Benami and that the plaintiff failed to establish the fact otherwise. Since, the burden to prove the fact was on the defendants which they failed to discharge, it is erroneous to say that the plaintiff has not proved the fact otherwise. The learned lower appellate court has also erred in law as it has observed in its judgment that the P.W. 1 in his entire statement has not disclosed the source of money by which his father purchased the house. This sentence indicates that the lower appellate court has felt that the burden lies on the plaintiff to show that the transaction was not Benami. The mere oral statement of defendant's witnesses that the defendants purchased the house after taking loan is not believable as there is no document to show that they have taken the loan. Statement of D.W. Harish Chand (defendant) recorded on 04.08.1975 shows that in his cross examination the witness says that a pronote was executed for taking loan but he further says that the said pronote has been destroyed as the loan had been paid back to the creditor. This makes the story of Benami transaction further suspicious in the circumstances of the case. Merely for the reason that the defendants might have invested some money in repairing the house (regarding which statement has been made by the witnesses) cannot deprive the plaintiff/appellant of his share in the property in suit.

10) For the reasons as discussed above, this Court has no hesitation in holding that both the courts below have erred in

law in observing that the plaintiff has failed to establish if the transaction relating to purchase of house in the name of Tika Ram was not Benami. The substantial question of law is accordingly answered in favour of the plaintiff / appellant.

Answer to substantial question of law No.2:

11) The defendants have come up with a case that the plaintiff has already got separated from the family of his father, as such, he cannot claim any share in the property in suit. From the evidence on record, it is clear that the plaintiff / appellant started living separately from his father after he joined the service. P.W. 1, Nathoo Ram (plaintiff) has stated in his statement recorded on 04.08.1975 that he did not leave the house and his children were born in that house. Assuming for a moment, that the plaintiff did not reside in the house with his father, this cannot deprive him of his status of member of the joint family. Merely by living separately one cannot be deprived of right to succession or his joint possession over the joint property. The defendants have set up a case that the plaintiff got separated and in oral evidence they have attempted to prove that, after some land of Tika Ram got acquired, the compensation was distributed between all the three brothers. However, the written statement does not disclose this pleading of distribution of compensation nor the material fact is pleaded that what property was acquired and what was the amount paid to the plaintiff separating his share from the joint property. Therefore, the approach of the courts below is erroneous as they have read the evidence which was not pleaded by the defendants. Accordingly, this Court is of the view that the dismissal of suit on the ground that plaintiff already got

separated, also suffers from material illegality on the part of both the courts below.

12) Also the lower appellate court has committed further error of law by holding that the suit for partition was barred by time. It is a settled principle of law that in the case of relief for partition, the limitation starts from the day the plaintiff has sought separation of his share and was denied. And for that purpose what has been pleaded in the plaint, is to be read. Here, again the lower appellate court has erred in law in ignoring what has been pleaded in the plaint.

13) For the reasons as discussed above, the dismissal of the suit on aforesaid ground is bad in law. Accordingly, the substantial question of law No. 2 is answered in favour of the plaintiff / appellant.

14) In view of the above discussion and reasons, the appeal deserves to be allowed. The appeal is allowed. The judgment and decree, passed by the trial court on 19.12.1978 in Civil Suit No. 26 of 1975 and judgment and decree dated 03.09.1981, passed by the lower appellate court in Civil Appeal No. 04 of 1979 are set aside. Original Suit No. 26 of 1975 is decreed with costs for partition of 1/3 share of the plaintiff / appellant. The trial court shall prepare the preliminary decree, accordingly.

(Prafulla C. Pant, J.)

Dt. March 20, 2006.

H. Negi

